89-1115

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

DEWEY SOWDERS, WARDEN, and
ATTORNEY GENERAL OF KENTUCKY,

Petitioners

versus

MAJOR CRANE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT'S OPINIONS IN CRANE V. KENTUCKY, 476 U.S. 683 (1986), AND DELAWARE V. VAN ARSDALL, 475 U.S. 673 (1986), ADOPTING HARMLESS ERROR ANALYSIS OF CROSS-EXAMINATION LIMITATIONS, REQUIRED NOT ONLY THAT THE EXCLUDED MATERIAL FACTS BE OTHERWISE PRESENTED TO THE JURY BUT ALSO IN AN "EQUALLY COMPREHENSIBLE" FORM AS IF THE CROSS-EXAMINATION HAD NOT BEEN LIMITED?

II.

WHETHER A HABEAS CORPUS PETITIONER IS REQUIRED BY TITLE 28 U.S.C. SECTION 2254 TO BEAR THE BURDEN OF DEMONSTRATING TO THE FEDERAL REVIEWING COURT THAT CONSTITUTIONAL ERRORS FOUND TO BE HARMLESS BY THE STATE APPELLATE COURT WERE PREJUDICIAL TO THE TRIAL OF HIS CASE?

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Dewey Sowders, Warden of the Northpoint Training Center (Prison) for the Commonwealth of Kentucky, and the Attorney General of the Commonwealth of Kentucky petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit granting federal habeas corpus relief to respondent.

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit filed and decided November 14, 1989. Crane v. Sowders, ___F.2d.___ (No. 89-5289), (Appx. at 55-66), affg., 708 F.Supp. 163 (W.D. Ky., 1988) (Appx. at 44-54). The jurisdiction of the United States District Court was invoked pursuant to Title 28 U.S.C. Section 2254. See Id., 708 F.Supp. at 166 (Appx. at 54). This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. Section 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (appx. at 55-66) is reported as Crane v Sowders, ___F.2d___ (6th Cir. 1989). The opinion of the United States District Court (appx. at 44-54), affirmed by the Sixth Circuit, is reported as Crane v. Sowders, 708 F.Supp. 163 (W.D.Ky., 1988).

The opinion of the Kentucky Supreme Court in this case is reported. Crane v. Commonwealth, 726

S.W.2d 302 (Ky. 1987)(Appx. at 17-43), cert.den., 484 U.S. 834 (1987); on remand from this Court, Crane v. Kentucky, 476 U.S. 683 (1986)(Appx. at 1-16).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Title 28 U.S.C. Section 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on th ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment

of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set fort in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support

the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

This case was previously reviewed by this Court on Crane's petition for certiorari to the Supreme Court of Kentucky. Crane v. Kentucky, 476 U.S. 683 (1986)(appx. at 1-17). In that opinion, the Court concluded that the Kentucky trial court's prohibition of cross-examining the police officers

regarding Crane's confession during the trial unconstitutionally limited Crane's opportunity to impeach the credibility of his confession, but the Court remanded to the Kentucky courts for harmless error analysis under Delaware v. Van Arsdall, 475 U.S. 673 (1986). Id., 476 U.S. at 691 (appx. at 16). Upon remand, the Kentucky Supreme Court found the error to be harmless beyond a reasonable doubt. Crane v. Commonwealth, 726 S.W.2d 302 at 307 (Ky. 1987)(appx. at 34-37). Crane filed a second petition for certiorari in this Court, which was denied. 484 U.S. 834 (1987). Crane then filed a habeas corpus petition in the United States District Court, and that Court ordered a new trial rejecting the Commonwealth's harmless error argument and the analysis of the Kentucky Supreme Court. Crane v. Sowders, 708 F.Supp. 163, at 166-167 (W.D. Ky. 1989)(appx. at 53). The District Court concluded that even if the facts Crane wanted to present to the jury were in fact presented, the presentation of these facts should "have been available to the jury in a form equally comprehensible to that offered by

petitioner." Id., 708 F.Supp. at 166. (Appx. at 53). The Commonwealth appealed. The Sixth Circuit Court of Appeals affirmed and concluded, "[N]o comprehensive picture of the confession setting was presented to the jury." Crane v. Sowders, __ F.2d ___, slip op. at 6 (6th Cir. No. 89-5289, November 14, 1989)(appx. at 64).

The facts of this case have been described by this Court in its previous opinion and need not be repeated in detail here. 474 U.S. at 684-686. (Appx. at 1-7). The principal evidence linking Crane to the murder was his confession. 476 U.S. at 691. (Appx. at 15). But Crane also made pre-arrest statements to Patrick Holder that he robbed a liquor store (TE II 57-58) and to his mother that he robbed the liquor store and shot the victim. (Officer Walter Tangle read Mrs. Crane's pretrial statement to the jury after Mrs. Crane in effect denied any memory of the statement. TE IV 57-58, TE IV 62. See Lawson, The Kentucky Evidence Law Handbook, 2nd Ed., Section 8.05, at pp. 203-206 [Michie 1984], regarding admissibility of the pretrial statement.)

On remand, the Kentucky Supreme Court quoted all of the proffered testimony that Crane wished to introduce and concluded that at most only six factors were contained in the proffered testimony regarding the circumstances of the confession: (1) the exact length of time Crane was questioned; (2) the exact size of the office where the questioning took place; (3) that none of Crane's family was present, although the police did contact one relative by telephone; (4) that Crane was provided with soft drinks in a conversational tone; and (6) that Crane was well treated by the police officers. Id., 726 S.W.2d at 307 (appx. at 34-37).

As the Commonwealth pointed out to the Sixth Circuit the only supposedly relevant testimony that the jury did not hear was the size of the interrogation room. (Brief for respondent/ appellant, Sixth Circuit No. 88-00478, p. 22). Neither the Federal District Court nor the Sixth Circuit found to the contrary. Id., 708 F.Supp. at 166 (appx. at 51-54), ___F.2d___, slip opinion at 5-7 (Appx. at 63-66).

At the trial evidence was introduced showing that Detective Branham was informed of the arrest at 6:15 p.m. He said he took the taped statement beginning at 7:50 p.m. (Detective Branham: TE II 13).[1/] (The foregoing evidence was more favorable to Crane than the actual facts warranted because it initially appeared that Crane might have been questioned during the previous hour and forty five minutes.) In fact, Crane was arrested at 5:52 p.m. No questions were even asked until 6:08 p.m. (Detective Burbrink: TH 8-9). Next, some twenty-five minutes were consumed by processing at the police station (Avowal[2/] testimony of Detective Burbrink: TE V 21). There were some

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1/. Branham also said the confession began at 8:50 p.m. (Detective Branham: TE II 14). That time is undoubtedly a mistake. All witnesses repeatedly said the actual time was 7:50 p.m. (Detective Branham: TH 13, 20-21, TE V 16). Crane was handed over to social workers at 8:45 (TH 11). Any belief by the jury that questioning lasted an extra hour merely strengthens the harmless error argument.

2/. Avowal is Kentucky's term for an offer of proof. Kentucky Civil Rule 43.10.

questions on the way to the Youth Bureau. Another twenty-one minutes were required for paper work at the bureau. Burbrink said he did not finish processing Crane until 6:59 (Detective Burbrink: TH 12). Based on the record, Crane was questioned for less than an hour prior to the taped confession. At trial the jury also heard that Crane wasn't turned over to juvenile authorities until after the confession (Detective Branham: TE II, 37-38) and that they had been giving him some soft drinks (Detective Burbrink: TE II, 45). The jury was told that the taped interview and confession was conducted by: "Myself, Detective Branham, Detective Milburn and also Detective Highland was in and out of the room at the time it was taken." (Detective Burbrink: TE II, 45). The jury heard that George Howard Williams ordered the bottle of T.W. Samuels, that Major Crane came in, said "this is a hold up," and shot the clerk when he turned to get away (Taped statement of George Williams: TE IV, 10). The jury heard that Crane was sixteen (16) at the the time (Id., at 11).

As has been stated, evidence was introduced showing that the only people present during the questioning were Crane and four police officers (Detective Burbrink: TE II 45). Again, the evidence presented to the jury was more favorable than the actual facts. The suppression hearing evidence showed that all but two of the officers came and went during the questioning (Detective Burbrink: TH 18). At least two officers made trips to obtain soft drinks for Crane (Detective Burbrink: TH 12, 26: Avowal Testimony of Detective Burbrink: TE V 22). It is clear that there was no police plot to isolate Crane.

REASONS FOR GRANTING THE WRIT[3/]

The Commonwealth has previously set forth in considerable detail the amount of evidence Crane introduced relating to inconsistencies in the confession. He was granted free reign by the trial court in this regard (Judge Eckart: TE II 6).

3/. All cases cited in this petition were cited in the Commonwealth's brief or reply brief in the Sixth Circuit or in the Sixth Circuit's opinion.

Discrepancies relating to whether money was taken (Detective Branham: TE II 16-33; Marvin L. Devers: IV 54), whether it was possible for Crane to have heard or seen the victim trigger an alarm (Detective Branham: TE II 35, 39-40), the time of the crime (Detective Branham: TE II 24, 31), and the caliber of the murder weapon (Detective Branham: TE II 256-27, 30-31) were all discussed at length. Vigorous defense arguments on these same points were made to the jury (Hon. Frank Jewell: TE VI 19-26).

As has been stated, the complaint made by Crane concerned only one of his three incriminating statements placed in evidence for the jury (Crane's confession to the police, to Patrick Holder: TE II, 57-58, and to his mother Geraldine Crane: TE IV, 62). In addition, there was the statement of George Williams which, like Crane's confession, was verifiably reliable because it mentioned the half-pint of T.W. Samuels (TE IV, 10). Despite the Kentucky trial court's ruling, nearly all the evidence that Crane desired and that he told the jury about in opening was presented to them. He was

permitted to make a broadside attack on the confession based on mistakes in the statement. In view of the weight of the evidence and the amount of evidence produced to support his theory that the one statement at issue should be disregarded, the one facet not presented to the jury (the room's size) was immaterial.

The Sixth Circuit opinion in this case focused primarily upon the question whether the evidence other than the confession was sufficient to sustain Crane's conviction rather than upon the specific facts Crane proffered for admission which were excluded from the jury by the trial court. Id., ___F.2d___, slip op. at 6 (appx. at 63-64). The only precedent for the equally comprehensive rule adopted by the Federal District Court and the Sixth Circuit was this Court's previous opinion in this case. Id., ___F.2d___, slip op. at 6, (appx. at 64-65), citing Crane v. Kentucky, at 690 (appx. at 13-14).

The Sixth Circuit and the Federal District Court failed to specify what provision of Title 28

U.S.C. Section 2254(d) justified their rejection of the fact-finding conducted by the Kentucky Supreme Court. Id., ___F.2d___, slip op. at 1-7 (appx. at 55-66); 708 F.Supp. 163-167 (appx. at 44-54). Rather these courts found error in the harmless error analysis of the Kentucky Supreme Court. But these courts also refused to accept the finding of the Kentucky Supreme Court as to the facts not presented to the jury, contrary to Miller v. Fenton, 474 U.S. 104 at 117 (1985). After quoting from the Kentucky Supreme Court's opinion, the Federal District Court opinion states:

> Respectfully, this Court disagrees. . . . We are not prepared to say that the prosecution can never carry its burden by pointing to an overwhelming weight of unrelated [sic] evidence. . . . [I]t is not sufficient for the Commonwealth to show that the information contained in the excluded avowal testimony was otherwise before the jury; the Commonwealth must also show that it was elsewhere presented, "in an equally comprehensive form." The information that the Commonwealth claims was otherwise available to the jury. . . cannot be said to have been available to the jury in a form equally comprehensible to that offered by petitioner. . . . The

> jury was entitled to observe the demeanor of the officers who described [during the avowal testimony] these and other circumstances of the interrogation they conducted. We cannot say that such an observation could have had no effect on the jurors' assessment of the credibility of the confession.

[Emphasis added.] Id., 708 F.Supp. at 166 (appx. at 51-53).

The Sixth Circuit opinion acknowledged that the defense opening statement explained its theory regarding the unreliability of the confession and that those factual details were admitted during the testimony of the police officers but concluded that the opening statement could not be counted to assemble those facts for the equally "comprehensible" requirement imposed by the District Court. Id., ____F.2d ___, slip op. at 6 (appx. at 64).

The Sixth Circuit opinion does not cite any previous opinion granting relief under the federal habeas corpus statute; every Sixth Circuit opinion cited was a direct appeal from a federal conviction; and no opinions of any other United States Court of Appeals were cited. Id., ___F.2d___, slip op. at 6

(appx. at 63-64). The Sixth Circuit opinion did cite opinions of this Court. Id., ___F.2d___, slip op. at 4-7 (appx. 60-65). Crane v. Kentucky, supra; Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); Delaware v. Van Arsdall, 475 U.S. 673 (1986).

In Delaware v. Van Arsdall, supra, 475 U.S. at 684, this Court described the test for harmless error analysis of unconstitutional limitations upon cross-examination of a prosecution witness:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

[Emphasis added.]

A key factor upon appellate review, the Court stressed, is "whether the not-fully-impeached evidence [Major Crane's confession] might have affected the reliability of the fact-finding process at trial." (Id.).

Nothing in the opinion requires that the testimony of the witness not fully cross-examined be excluded from the analysis nor was overwhelming evidence of guilt established as the sole or primary factor in the analysis, contrary to the Sixth's opinion in this case. See Id., ___F.2d___, slip op. at 5-6 (appx. at 63-64). In Bourjaily v. United States, 483 U.S. 171 (1987), this Court held the trial court could consider the statement itself in determining the reliability and admissibility of a co-conspirator's statement under the hearsay exception for such statements.

Moreover, the District Court's opinion in this case clearly reflects erroneous analysis since it suggests that any limitation upon cross-examination violates the confrontation clause by limiting the jury's opportunity to observe the

demeanor of the witness. Id., 708 F.Supp. at 166 (appx. at 53). The Sixth Circuit previously reversed the same District Court for a similarly erroneous analysis regarding a criminal defendant's right of cross-examination. Dorsey v. Parke, 872 F.2d 163 (6th Cir. 1989).

In Delaware v. Van Arsdall, supra, this Court rejected Van Arsdall's automatic reversal argument for limitations on cross-examination violating the Confrontation Clause. Crane's argument in the Sixth Circuit was very similar to the rejected argument. The Court summarized the rejected argument (485 U.S. at 683-684):

> Respondent's second argument in support of a per se reversal rule is that the Confrontation Clause error in this case, which like Davis [v. Alaska, 415 U.S. 308 (1974)] involved the exclusion of evidence, is analytically distinct from that in Harrington v. California, which involved the erroneous admission of harmless testimony. Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated.

[Emphasis in Original.]

The Sixth Circuit Court of Appeals rejected a somewhat similar argument in Dorsey v. Parke, 872 F.2d 163 at 167 (6th Cir. 1989) and noted:

> "[O]nce cross-examination reveals sufficient information to appreciate the witnesses' veracity, confrontation demands are satisfied." . . . [A confrontation violation occurs] when the defense is barred from adducing "facts from which jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." . . . [Or] when the defense is not allowed to "plac[e] before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred [.]"

[Citations omitted. Emphasis in original.] See also, Pennsylvania v. Ritchie, 480 U.S. 39 (1987), holding that defense counsel was not entitled to personally inspect government records to protect right of confrontation/cross-examination; United States v. Viera, 819 F.2d 498 at 501 (5th Cir. 1987), opinion on en banc rehearing, 839 F.2d 1113 at 1114 and 1116 (5th Cir. en banc 1988) [the en banc court unanimously approved the portion of the panel opinion cited] harmless error analysis of cross-examination limitations conducted by reviewing

all evidence presented to the jury to show bias of prosecution witness.

Crane complained in effect that the other evidence cited by the Commonwealth regarding the circumstances of his confession was too greatly dispersed throughout the trial for his defense counsel's ability to present the credibility of the confession to the jury. An elementary principle of Kentucky law is that in closing argument counsel may refer to any matter properly in evidence and any reasonable inferences based on the evidence. Woodford v. Commonwealth, Ky., 376 S.W.2d 526 at 528 (1964); Hunt v. Commonwealth, Ky., 466 S.W.2d 957 at 959 (1971); Nugent v. Commonwealth, Ky., 639 SW.2d 761 at 765 (1982); Baird v. Commonwealth, Ky.App., 709 S.W.2d 458 at 460 (1986).

The trial transcript reflects that Crane's trial counsel did present an effective closing argument describing the factual inconsistencies presented by the confession. (Closing Argument of Frank Jewell, Attorney for Crane, TE VI 17-40).

In United States v. Frady, 456 U.S. 152 at 166-170, a federal habeas corpus attack on a federal conviction, this Court stated:

> We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.
>
> * * * * *
>
> Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

[Emphasis in original.]

In Rose v. Clark, 478 U.S. 570 at 576-577 (1986), cited by Crane in the Sixth Circuit, this court listed cases identifying those matters previously held subject to harmless error analysis, which cases are contrary to earlier opinions declining to apply the harmless error rule. Moreover, this Court stated (478 U.S. at 579):

> Where a reviewing Court can find that the record developed at trial establishes guilt beyond a

> reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

In United States v. Hasting, 461 U.S. 499 at 509 (1983), this Court stated:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]

[Emphasis added.]

The Court's opinion in Rose v. Clark did not declare that the state habeas respondent was required to convince the federal court beyond a reasonable doubt that the error was harmless only by overwhelming evidence of guilt. As noted in Rose v. Clark, supra, 478 U.S. at 578, citing Delaware v. Van Arsdall, supra, 475 U.S. at 681:

> [C]onstitutional errors may be harmless "in terms of their effect on the fact finding process at trial[.]

[Emphasis supplied by the Court in Rose v. Clark.] On remand in Clark v. Rose, 822 F.2d 596 at 600 (6th Cir. 1987), the Sixth Circuit Court concluded that the error was harmless and cited Frady.

In Strickland v. Washington, 466 U.S. 668 at 687 (1984), cited by Crane in the Sixth Circuit, this Court expressly imposed upon the defendant in a criminal case the burden of proving ineffective assistance of counsel including prejudice caused thereby. The thrust of Crane's argument was that the Kentucky trial court's erroneous ruling deprived him of effective assistance of counsel by limiting what his trial counsel could present to the jury to overcome his confession. In Crane's case the Sixth Circuit held that a "reasonable possibility" was sufficient to warrant setting aside Crane's conviction. Id., ___F.2d ___, slip op. at 7 (appx. at 65-66). In Strickland v. Washington, supra, 466 U.S. at 695, the Court stated:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.

[Emphasis added.]

The express standard used in the Sixth Circuit opinion significantly erodes the reliability of convictions in post-conviction proceedings by

requiring that the State bear the burden of demonstrating that there is no "reasonable possibility that. . . [the trial error] could have contributed to the guilty verdict[.]"[Emphasis added.] Id., ___F.2d___, slip op. at 7 (appx. at 65-66). The Commonwealth contends that the reasonable doubt standard requires a reasonable probability not a mere possibility. As the court stated in Strickland, 466 U.S. at 693, "It is not enough for the defendant [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings."

In Greer v. Miller, 483 U.S. 756 (1987), this Court approved the determination of the Illinois Supreme Court that the constitutional error was harmless and rejected the determination of Seventh Circuit en banc to the contrary. Justice Stevens filed a concurring opinion suggesting that the beyond a reasonable doubt harmless error standard did not always apply to collateral attacks (483 U.S. at 768):

> On direct review, a conviction should be reversed if a defendant

> can demonstrate that a Doyle error occurred at trial, and the state cannot demonstrate that it is harmless beyond a reasonable doubt. But, in typical collateral attacks, such as today's, Doyle errors are not so fundamentally unfair that convictions must be reversed whenever the state cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.

[Emphasis in original.]

Title 28 U.S.C. Section 2254 places the burden of proof upon the habeas corpus petitioner. No provision of that statute requires that the state/respondent bear the burden of proving the absence of prejudice. Subsection (d) concludes, "[T]he burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous."

In Miller v. Fenton, 474 U.S. 104 at 112 (1985), this Court held that federal habeas courts were not bound by state court conclusions regarding federal law but noted:

> [T]he federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state judiciary.

In Cabana v. Bullock, 474 U.S. 376 (1986), this Court held that a state appellate court may make federally required findings even after a habeas petition is filed and noted (474 U.S. at 391), "Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants[.]"

Clearly, the Sixth Circuit Court failed to follow the standard of constitutional analysis adopted by this Court in Delaware v. Van Arsdall. That opinion does not require that the testimony of the witness upon whom cross-examination was limited be excluded in determining prejudice. Instead, the analysis established by this Court focuses on the facts not presented to the jury.

The Sixth Circuit opinion in this case has imposed a new requirement of constitutional law not authorized by this Court's opinion in Delaware v. Van Arsdall and not required by Crane v. Kentucky. Review by this Court would serve to clarify both opinions and the harmless error rule in post-conviction proceedings.